SAMUEL C. GEORGE

IBLA 79-125 Decided March 2, 1979

Appeal from decision of the California State Office, Bureau of Land Management, rejecting application for an Indian allotment, CA 4640.

Affirmed.

1. Indian Allotments on Public Domain: Generally--Indian Allotments on Public Domain: Lands Subject to

Where the Secretary of Agriculture has made a determination pursuant to sec. 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1976) that lands within a national forest are of no value for the timber found thereon and are of negligible value for agricultural or grazing purposes, the Secretary of the Interior may reject the allotment where the record shows that the land in question is not a viable economic agricultural unit.

APPEARANCES: Charles D. Slote, Esq., Yreka, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is an appeal from a decision dated November 14, 1978, rendered by the California State Office, Bureau of Land Management (BLM), rejecting appellant's Indian allotment application CA 4640. The application had been previously rejected by BLM decision dated November 14, 1977. That rejection was appealed to this Board which set the decision aside and remanded sub nomine Samuel C. George, 35 IBLA 19 (1978). We remanded the matter for further report from the Department of Agriculture for a clear determination of whether the land applied for was or was not more valuable for agriculture or grazing than for its timber.

The decision here appealed rejected the application because it found the land to have no economic agricultural or grazing potential and because neither applicant nor his family occupied the land or had improvements thereon, as required by section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1976), which provides:

> The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest * * *. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

Pursuant to our remand a further report was submitted by the Forest Service, Department of Agriculture. The relevant paragraphs of the report are as follows:

> The applied-for lands are not more valuable for agriculture or grazing than for the timber found thereon * * *.
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> If the lands fail to have value for agricultural or grazing purposes, then it does not matter that the lands have no value for timber. Lands which are not valuable for agricultural or grazing purposes are <u>not</u> more valuable for agricultural or grazing purposes than for the timber found thereon simply because the lands have no value for timber.
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> In regard to the physical conditions found on the ground, for the purpose of Indian allotment application, the lands are considered to have no value for agriculture or grazing. This is not to say that the lands will support absolutely no cultivated plants or domestic livestock. The lands, like almost any land, will support a very minimal amount of cultivated plants and a very limited number of domestic livestock; however, this does not qualify the lands as agricultural or grazing lands.
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> Also, the land is considered to have no value for timber. The applied-for lands consist of five parcels varying in size of 0.75 acres to 3.00 acres along the South Fork of the Salmon River. Although the parcels are in a timber

setting, they are grass covered meadows which for the most part are without trees. However, a few scattered conifers and hardwoods do grow within the parcels. Thus, it can be said that the lands support no significant amount of timber. In other words, the lands have a nominal amount of timber; and, for the purpose of Indian allotment application, the lands are considered to have no value for timber.

Therefore, the lands are considered to have no value for either agricultural or grazing purposes or for timber found thereon. Thus, it can be stated that the lands are not more valuable for agricultural or grazing purposes than for the timber found thereon.

* * * * * * *

If, however, it must be considered that any lands that have an agricultural and grazing value, to any degree, are so valuable and any lands that have a timber value, to any degree, are so valuable, then a choice between a minimal agricultural and grazing value and a nominal timber value is a difficult choice to make. However, the lands probably have a slightly greater value for agriculture and grazing than they do for timber.

In this event, another approach may be taken and a recommendation made that an allotment be denied for a different reason.

The applied-for lands could be expected to produce a very limited amount of agricultural products. The lands would be unable physically to grow sufficient agricultural products to make marketing economically feasible in the open market. Locally, since many of the inhabitants in this remote area have their own fruit orchards and vegetable gardens, orchard and vegetable garden produce would have a negligible commercial value.

Similarly, about four cows only could be sustained on the applied-for lands for six months each year. Because of snow conditions, the cows would need to be moved to other pasture for the remaining six months. In general, in the more suitable valleys in the area, it takes a minimum of 100 head of cattle to support a rural family of four at the poverty level.

In his statement of reasons, appellant alleges that he could sell orchard crops in other parts of the county, that his family has used the property for grazing for 60 years, and that his father constructed improvements on a portion of the land. However, the record shows that appellant and his family "have sporadically utilized some of the

applied for parcels by either occupying, fencing, or grazing cattle thereon * * * [G]aps in occupancy and use of between 30 and 40 years have occurred." Periods of no occupancy and nonuse of these durations are too long to consider that there has been continuous occupancy and use of the applied for parcels by the applicant and his family. "As required by Section 31 of the Act of June 25, 1910, * * * [25 U.S.C. § 337 (1976)], the applicant does not occupy, live on or have improvements on the applied for parcels." Forest Service report of September 29, 1977, at p.2. Appellant has submitted no evidence to rebut these findings - he simply asserts that his family "has used the property for some 60 years and that his father constructed improvements on a portion of the land."

As shown earlier, section 31 of the Act of June 25, 1910, supra, provides:

> The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest * * *.

It seems clear that the requirement for "occupying, living on, or having improvements" is addressed not to events which occurred in the remote past but which are no longer present. However, we need not resolve this issue since we find that the application cannot be allowed as shown infra.

[1] Appellant's allegations are unsupported by data which could controvert the findings of the Forest Service. One of the crucial conclusions reached by the Forest Service is that the applied-for land is not a viable economic unit agriculturally. In Curtis D. Peters, 13 IBLA 4 (1973), we stated:

> This Department is not required to grant an Indian allotment within a national forest merely because the statutory criteria have been satisfied. The 1910 Act is crystal clear that, "[t]he Secretary of the Interior is authorized, in his discretion" to make such a grant. The proper exercise of discretionary authority by this Department has received judicial sanction. See Udall v. Tallman, 380 U.S. 1 (1965), rehearing denied, 380 U.S. 989 (1965); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963); Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960).
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> Approval of an Indian allotment never was and is not now a mere ministerial duty of this Department. Finch v.

United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). The exercise of discretionary authority must be predicated upon rational grounds. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972). See Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Daniels v. United States, 247 F. Supp. 193 (W.D. Okla. 1965).

The information of record indicates that the land could not support reasonably an Indian family. See Hopkins v. United States, supra * * *. Although it is true that Indian allotment applications for lands in national forests are not subject to the classification authority of the Secretary of the Interior, Bobby Lee Moore, 72 I.D. 505, 513 (1965), the issue of the economic viability of the allotment sought is a matter to be considered by the Department in exercising its discretion. See John E. Balmer, 71 I.D. 66 (1964).

In Balmer, at p. 67, the Department stated:

> Since the intent of the Indian Allotment Act is to provide, in effect, a homestead which will constitute the source of a livelihood for an Indian family * * * it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act. [Footnotes omitted.]

In Peters, as in the case at bar, the data of record indicated that the agricultural potential of the land was minimal, at best. 43 CFR 2533.2 requires that "the land * * * [be] found to be chiefly valuable for agriculture or grazing * * *." (Emphasis added.) The issue whether the land is more valuable for agriculture or grazing, or for the timber found thereon needs no resolution or further discussion. The record herein indicates that the agricultural potential of the land is insufficient to support this use on an economic basis and therefore affords a rational basis for rejecting the application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Frederick Fishman
Administrative Judge

We concur:

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Anne Poindexter Lewis
Administrative Judge

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Douglas E. Henriques
Administrative Judge